RECORD AND BRIEFS

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In the Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD., AND JACK C. PHILLIPS,
Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION; CHARLIE CRAIG; AND DAVID MULLINS,
Respondents.

On Writ of Certiorari to the Court of Appeals of Colorado

BRIEF OF *AMICI CURIAE* SCHOLARS OF BEHAVORIAL SCIENCE AND ECONOMICS IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. With the support of L&E Scholars, Petitioners attempt to show that Colorado's interest in preventing discrimination based on sexual orientation is not supported by economic concerns 4

II. Applying neoclassical economic theories, L&E Scholars argue that allowing discrimination advances social welfare by allowing the market to regulate individual conduct 5

III. Contemporary scholarship in behavioral economics has revealed flaws in neoclassical assumptions and undermined the policy conclusions that flow from those assumptions 7

IV. Markets do not operate on a purely rational basis, as behavioral economics reveals. Accordingly, they cannot be expected to eliminate the negative effects of discrimination 9

V. L&E Scholars' neoclassical arguments provide no greater support for discrimination based on sexual orientation than they do for racial discrimination 11

CONCLUSION 13

APPENDIX - Names and Academic Titles of *Amici* . . . . . App. 1

TABLE OF AUTHORITIES

CASES

Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. 2015) 4

OTHER AUTHORITIES

KENNETH J. ARROW, SOME MODELS OF RACIAL DISCRIMINATION IN THE LABOR MARKET (Rand 1971) 10

OREN BAR-GILL, SEDUCTION BY CONTRACT—LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS (2012) 3, 9

GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION (U. Chi. 1957) 9

GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION (U. Chi. 1971) 9, 10

Thomas C. Berg, *Symposium: Religious Accommodation and the Welfare State*, 38 HARV. J.L. & GENDER 103 (2015) 7

Kerwin Kofi Charles & Jonathan Guryan, *Prejudice and Wages: An Empirical Assessment of Becker's The Economics of Discrimination*, 116 J. POLIT. ECON. 773 (2008) 10

RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992) 12

Richard A. Epstein, *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts As A Human Right*, 66 STAN. L. REV. 1241 (2014) 12

Christine Jolls, Cass R. Sunstein, & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998) 6, 8

Daniel Kahneman, THINKING, FAST AND SLOW (2011) 8

Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619 (2015) 7

Anne O. Krueger, *The Economics of Discrimination*, 71 J. POLIT. ECON. 481 (1963) 10

Michael Lewis, THE UNDOING PROJECT: A FRIENDSHIP THAT CHANGED OUR MINDS (2016) . 8

Celia McGee, *The Open Road Wasn't Quite Open to All*, N.Y. TIMES, Aug. 22, 2010, *available at http://www.nytimes.com/2010/08/23/books/23green.html* 12

Nathan B. Oman, *Doux Commerce, Religion, and the Limits of Antidiscrimination Law*, 92 IND. L.J. 693 (2017) 6, 7

RICHARD H. THALER, MISBEHAVING: THE MAKING OF BEHAVIORAL ECONOMICS (2015) 6, 8

RICHARD THALER AND CASS SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008) 8

The Behavioral Economics Guide 2015, *available at https://www.www.behavioraleconomics.com/the-behavioral-economics-guide-2015/* 8

THE NEGRO MOTORIST GREEN BOOK: AN INTERNATIONAL TRAVEL GUIDE, N.Y. PUB. LIBRARY, *available at https://digitalcollections.nypl.org/collections/the-green-book#/* 12

INTEREST OF *AMICI*[1]

Amici are nine professors in the fields of economics, sociology, psychology, law, and public policy who engage in significant research and teaching on behavioral science and behavioral economics. *See* Appendix (listing individual *amici*). This brief addresses issues that are within *amici's* particular areas of scholarly expertise.

Behavioral economics applies psychological and sociological insights into human behavior to explain economic decision-making. This field has shown that consumer behavior in many situations systematically departs from that predicted by traditional, neoclassical economic theory, which assumes more purely rational, mathematical decision making.

Petitioners, with the support of *amicus curiae* Law and Economics Scholars ("L&E Scholars"), ask the Court to find a First Amendment right based on principles of neoclassical economics. But the research of *amici* and others working in similar and related disciplines has shown that those neoclassical principles are often incomplete or artificially constrained and not reflective of the complexity of real world situations. As

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. Universal consents to the filing of amicus briefs were filed by Petitioners Masterpiece Cakeshop, Ltd. and Jack C. Phillips on July 20, 2017, and by Respondent Colorado Civil Rights Commission on July 26, 2017. Respondents Charlie Craig and David Mullins consented to the filing of this brief by email from their counsel on October 25, 2017.

a result, *amici* can help the Court better contextualize and understand the limits of L&E Scholars' economic arguments.

In addition to their arguments based on neoclassical economics, L&E Scholars present a surprising amount of non-economic editorial regarding the purported intolerance of governments for discriminatory business practices (L&E Scholars ACB 13), the perceived dangers of political correctness (L&E Scholars ACB 25), and the unsubstantiated belief that people of faith face greater discrimination in the United States than members of the LGBT community (L&E Scholars ACB 17-18). *Amici* offer no response to these normative arguments except to note the extent to which they are based on a selective anecdote, at most and not on scholarly authorities of any kind. Rather, *amici* write only to dispel the notion that any contemporary consensus regarding economic principles supports discrimination as a societal good.

SUMMARY OF ARGUMENT

In a fairly narrow part of its underlying decision, the Colorado Court of Appeals reviewed a Michigan study reflecting the negative, economic impacts of discrimination against the LGBT community. L&E Scholars write with the ostensible purpose of disputing the Colorado Court's brief analysis of this economic effect. They devote some attention to disputing the findings of the Michigan study—without citation to contrary, empirical studies. But, the primary thrust of L&E Scholars' argument is their claim that, absent monopoly conditions that limit consumer choice, economic efficiency and social welfare are enhanced by

removing governmental restraints on discriminatory business practices.

They claim that victims of discrimination have access to alternative sources of goods and services, while discriminatory firms will face both the direct loss of business from refusing certain customers and indirect loss of business from prospective customers who will refuse to patronize firms that discriminate. In this way, they argue, the free market will protect against widespread discrimination and ensure that only those firms with sincerely held religious bases for their conduct will choose to discriminate.

L&E Scholars' views are informed by neoclassical economic theories, which assume that all economic actors make purely rational choices designed to maximize their economic self-interest. But, decades of behavioral-economic research reveal that those neoclassical assumptions are often incorrect. As common sense would suggest, modern economic theory has shown conclusively that human beings are not perfectly rational and, as a result, the market cannot always be counted on to self-correct and produce a welfare-maximizing outcome. *E.g.*, OREN BAR-GILL, SEDUCTION BY CONTRACT—LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS (2012). The Court's consideration of policy implications of constitutional claims should not rest on the incomplete and often inaccurate assumptions of neoclassical economics.

Tacitly recognizing that their prediction of a self-correcting free market has proven inaccurate in the context of racial discrimination, L&E Scholars' argue that economic conditions in the Jim Crow South

involved a "monopoly" of discriminatory businesses, which interfered with the proper functioning of the market. (L&E ACB at 3, 9, 11.) They contend that no similar distortion is present in today's market that would inhibit gay individuals from participating in the marketplace—despite acknowledging that same-sex couples still find themselves resorting to lists of "gay-friendly" businesses to avoid homophobic reactions from business owners, harassment, or worse. (*See* L&E ACB at 13 & n.2.) But, their arguments reveal no principled reason to distinguish between the expected economic impacts of discrimination based on sexual orientation and the impacts of racial discrimination. Neoclassical assumptions fall short in both scenarios.

ARGUMENT

I. With the support of L&E Scholars, Petitioners attempt to show that Colorado's interest in preventing discrimination based on sexual orientation is not supported by economic concerns.

The Colorado Court of Appeals' underlying decision rests almost entirely on non-economic considerations—whether Masterpiece Cakeshop engaged in discriminatory conduct, whether the Colorado Civil Rights Commission's "cease and desist" order compelled expressive conduct or symbolic speech, and what level of judicial scrutiny applies to Masterpiece Cakeshop's "free exercise" challenges under the state and federal constitutions. *See Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 279-93 (Colo. 2015). In a single paragraph, however, the Colorado court considered the economic impacts that served as one rational basis—in addition to the State's

"compelling interest in eliminating discrimination"—for the State's desire to prohibit discrimination based on sexual orientation, impacts reflected in a study conducted by the State of Michigan. *Id.* at 293-94.

Petitioners briefly respond to this rationale. They argue that the state has no economic interest in preventing the discrimination at issue in this case because same-sex couples have access to alternative service providers and because the evidence of negative economic impacts identified by the state is inadequate. *See* Brief for Petitioners, 50-52. For a more complete discussion of their point, Petitioners direct the Court to L&E Scholars' brief. *Id.* at 50.

II. Applying neoclassical economic theories, L&E Scholars argue that allowing discrimination advances social welfare by allowing the market to regulate individual conduct.

For their part, L&E Scholars' economic arguments—as distinguished from their broader statements of opinion and views on current events—center on their claim that the state need not regulate in this area because economic forces will prevent widespread discrimination. *See* L&E Scholars' ACB 11-18. Briefly stated, discrimination carries negative economic impacts for the discriminator. As a result, say L&E Scholars, the market will provide alternative sources of goods and services to same-sex couples and ensure that only businesses with sincerely held religious motivations will be willing to engage in discrimination, in light of the consequences, so long as there is no monopoly to impede consumer choice. *Id.* Thus, for example, the problem with Jim Crow laws in

the South wasn't discrimination; it was that white people had a monopoly on southern lunch counters. *See* L&E Scholars ACB, 11-12.

L&E Scholars' belief that the market will necessarily "self-correct" to eliminate the negative effects of discrimination on discriminated populations is premised on neoclassical economic theories. Neoclassical economics assumed that people make decisions based strictly on rational considerations, maximizing their self-interest. *E.g.*, RICHARD H. THALER, MISBEHAVING: THE MAKING OF BEHAVIORAL ECONOMICS, 4-5 (2015) ("*Misbehaving*"); Christine Jolls, Cass R. Sunstein, & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1476 (1998) ("*Behavioral Law and Economics*").

While not explicit in L&E Scholars' Amicus Brief, these assumptions pervade their analysis. L&E Scholars contend, for example, that the "ordinary give-and-take of the market" and business owners' "self-interest" in maximizing their profits will eventually overcome systemic prejudice in the market. L&E ACB 3, 9. In support, they cite articles by Andrew Koppelman, Thomas Berg, and Nathan Oman. L&E ACB at 14. But each relies, implicitly or explicitly, on neoclassical assumptions about human behavior. Nathan Oman invokes the 18th-century "doux-commerce" theory, which proposes that in a market setting, gentle manners and cordiality will be favored because individuals all act rationally and with maximum self-interest—an idea that "harks back to eighteenth-century theorists of the market[.]" Nathan B. Oman, *Doux Commerce, Religion, and the Limits of*

Antidiscrimination Law, 92 IND. L.J. 693, 719 (2017). Andrew Koppelman supposes without supporting evidence that, so long as people are largely protected from discrimination, allowing "a few outliers" to refuse to serve for discriminatory reasons "won't make any difference." Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 627-28 (2015). Likewise, Thomas C. Berg concludes that "only a very small number of deeply committed business owners" will discriminate because of market pressures to compete and maximize profits. Thomas C. Berg, *Symposium: Religious Accommodation and the Welfare State*, 38 HARV. J.L. & GENDER 103, 138 (2015).

Understanding the theoretical background for L&E Scholars' arguments is critical because, as discussed below, that background has been significantly called into doubt.

III. Contemporary scholarship in behavioral economics has revealed flaws in neoclassical assumptions and undermined the policy conclusions that flow from those assumptions.

Neoclassical theory remains a viable basis for predicting macroeconomic impacts in contexts where its underlying assumptions of rational, informed action can be shown to be accurate. But more recent work in "behavioral economics"—which stands at the intersection of traditional economics and other social sciences, especially psychology—reveals the ways in which rational decision-making is not the norm. Rather, decisions in the real world are often impacted by cognitive limitations, biases, and mental shortcuts.

See THALER, MISBEHAVING, *supra*, at 5-6; *see also* Jolls, *Behavioral Law and Economics*, *supra*, at 1471. Behavioral economics explores these very human—and typically unseen—cognitive and emotional predispositions, which so heavily influence the decisions we make. Amongst other benefits, that exploration allows the public to better understand the practical effects of laws and policies.

At about 35 years of study, behavioral economics is still a relatively new field, but in that short time it has won wide—and ever growing—academic consensus regarding the accuracy of its conclusions. RICHARD R. THALER, MISBEHAVING, *supra*, at 9; *The Behavioral Economics Guide 2015*, at 2, *available at https://www.behavioraleconomics.com/the-behavioral-economics-guide-2015/*. In fact, the Nobel Prize for Economics has twice in recent years been awarded for pioneering work in behavioral economics, to Daniel Kahneman in 2002 and to Richard Thaler in 2017.

These findings have even migrated from the academy into mainstream consciousness and policymaking circles. Such works as Daniel Kahneman's THINKING, FAST AND SLOW (2011), Richard Thaler and Cass Sunstein's NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008), and Michael Lewis's THE UNDOING PROJECT: A FRIENDSHIP THAT CHANGED OUR MINDS (2016) have all helped to bring the key insights of behavioral economics into the popular imagination.

As relevant here, this modern line of thinking has shown that markets cannot always be counted on to "self-correct" and produce a welfare-maximizing outcome because individuals in the market are not

uniformly and reliably rational in a way that would support the argument of Petitioners and L&E Scholars. *E.g.*, OREN BAR-GILL, SEDUCTION BY CONTRACT LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS (2012).

IV. Markets do not operate on a purely rational basis, as behavioral economics reveal. Accordingly, they cannot be expected to eliminate the negative effects of discrimination.

L&E Scholars claim that market pressures will eliminate nearly all instances of discrimination without the need for legal prohibitions. *See* L&E Scholars ACB 11, 14. As support, aside from the theoretical suppositions of Koppelman, Berg, and Oman discussed above, L&E Scholars cite Gary Becker's work on the economics of racial discrimination from his 1971 THE ECONOMICS OF DISCRIMINATION.[2] (L&E ACB at 10, 16.) L&E Scholars' reliance on Becker's work is misplaced, and merits a closer examination of Becker's research.

While Becker is generally regarded as an economist in the neoclassical tradition, his work does not support the inferences L&E Scholars would have this Court draw. He and contemporaries concluded that while a "White" market may have experienced a net gain in income from discriminatory practices—at the expense of the segregated, African-American sector—discrimination still had a distorting effect on the economy, and the free market did not "self-correct" or

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[2] Originally published in 1957. *See* GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION (U. Chi. 1957).

produce a welfare-maximizing outcome. *See* GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION 2-3, 22-23 (U. Chi. 1971); *see also* Anne O. Krueger, *The Economics of Discrimination*, 71 J. POLIT. ECON. 481, 484-486 (1963) (discussing Becker's work); Kerwin Kofi Charles & Jonathan Guryan, *Prejudice and Wages: An Empirical Assessment of Becker's The Economics of Discrimination*, 116 J. POLIT. ECON. 773, 775, 780-781 (2008) (validating Becker's predictions that racial discrimination would have lasting negative effect on African-American wages); *cf.* KENNETH J. ARROW, SOME MODELS OF RACIAL DISCRIMINATION IN THE LABOR MARKET 1, 6 (Rand 1971) (identifying deficiencies in neoclassical economics in analyzing racial discrimination).

That Becker's predictions can be confirmed by contemporary data regarding wage gaps strongly suggests that the market will not self-correct to end discrimination; to the contrary, it has failed to do so through this day. *See* Charles & Guryan, *Prejudice and Wages*, *supra*, at 775-76, 782-91 & fig. 1, tbl. 1 (analyzing data from the General Social Survey (GSS) from 1972 through 2004 regarding racial prejudice); *see also* BECKER, THE ECONOMICS OF DISCRIMINATION (2d Ed.), *supra*, at 2-3 (noting market discrimination against the best educated and trained non-whites actually increased, rather than decreased, since 1957). Thus, while L&E Scholars are not the first to argue that market forces will eliminate or minimize discrimination, and prejudiced businesses will be "driven out of the market," modern economic research has demonstrated otherwise. Charles & Guryan, *Prejudice and Wages*, *supra*, at 774-75, 781 (collecting authorities).

V. L&E Scholars' neoclassical assumptions provide no greater support for discrimination based on sexual orientation than they do for racial discrimination.

L&E Scholars anticipate the point that their theories have proven false in the context of racial discrimination and attempt to distinguish Petitioners' discrimination against same-sex couples. They claim that a monopoly of discriminatory businesses in the Jim Crow South distorted the free market in ways that "do not exist today."[3] *See* L&E ACB at 3, 9, 11.) As evidence, they point to the existence of alternative businesses willing to serve gay customers and online lists recommending businesses with a reputation for being "gay friendly." *See* L&E ACB 13 & n.2.

L&E Scholars are hoisted with their own petard. After all, such lists are popular precisely because they help gay individuals and couples avoid humiliation or worse in the face of pervasive homophobia. In this respect, they are similar to the "Green Book" used by African-American travelers for almost three decades

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[3] One need hardly expend much imagination to counter L&E Scholars' suggestion that no discriminatory monopoly exists today. While they detail the alternative, gay-friendly options available to the residents of Denver, one reasonably anticipates large areas of the country with substantially fewer options. The same resource identified by L&E Scholars—gayweddings.com—reveals many entire states with ten or fewer bakers willing to prepare cakes for same-sex couples, and nearly all are clustered in and around urban centers. Yet, the constitutional rule L&E Scholars advance would apply the same way in downtown San Francisco as in rural Wyoming or South Dakota, states with only two bakeries each listed on gayweddings.com.

beginning in 1936 to help them select hotels, restaurants, and other businesses that would be Black-friendly in the face of rampant racial discrimination and Jim Crow laws. *See* THE NEGRO MOTORIST GREEN BOOK: AN INTERNATIONAL TRAVEL GUIDE ("There will be a day sometime in the near future when this guide will not have to be published. That is when we as a race will have equal opportunities and privileges in the United States."), N.Y. PUB. LIBRARY, *available at https://digitalcollections.nypl.org/collections/the-green-book#/* (last visited Oct. 23, 2017); *see* Celia McGee, *The Open Road Wasn't Quite Open to All*, N.Y. TIMES, Aug. 22, 2010, *available at http://www.nytimes.com/2010/08/23/books/23green.html* (last visited Oct. 23, 2017). The Civil Rights Act was passed in 1964, and Mr. Green stopped publishing his guide.

L&E Scholars' attempt to distinguish between discrimination based on race and sexual orientation rings particularly hollow in light of the fact that their own Richard Epstein has used the same arguments he presents here to advocate for the total repeal of the Civil Rights Act of 1964. Richard A. Epstein, *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, 66 STAN. L. REV. 1241, 1291 (2014); RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992). Epstein's writings only bolster the conclusion that L&E Scholars have presented no principled reason to distinguish the predicted economic consequences of discrimination based on sexual orientation from those based on racial discrimination. Rather than advance an argument supported by empirical evidence, closer inspection of

L&E Scholars' brief reveals that their position is a normative one cloaked in the guise of science.

CONCLUSION

No contemporary consensus regarding economic principles supports discrimination—or exceptions to anti-discrimination laws—as a societal good. The modern corpus of economic research undermines the inferences L&E Amici ask this Court to draw. Rather, L&E Amici's argument that anti-discrimination laws should be held to be unnecessary and the market should have the opportunity to "self-correct" is a nakedly normative position. Its appeal to economic principles is unscientific and should not be credited.

Respectfully submitted,

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APPENDIX

TABLE OF CONTENTS

APPENDIX - Names and Academic Titles of *Amici* . . . . . App. 1

APPENDIX

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